

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 12-Dec. 18, 2022)

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The federal courts issue hundreds of decisions every week in cases involving diverse legal disputes. This Sidebar series selects decisions from the past week that may be of particular interest to federal lawmakers, focusing on orders and decisions of the [Supreme Court](#) and precedential decisions of the courts of appeals for the [13 federal circuits](#). Selected cases typically involve the interpretation or validity of federal statutes and regulations or constitutional issues relevant to Congress's lawmaking and oversight functions.

Some cases identified in this Sidebar, or the legal questions they address, are examined in other CRS general distribution products. Members of Congress and congressional staff may [click here](#) to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS Attorneys.

Decisions of the Supreme Court

Last week, the Supreme Court granted certiorari in four cases:

- **Criminal Law & Procedure:** The [Confrontation Clause](#) of the Sixth Amendment gives criminal defendants the right to cross-examine witnesses against them. To that end, the Supreme Court has long held that the government may not introduce a codefendant's confession implicating another defendant in a joint trial because the confessing defendant has the right to refuse to testify and therefore cannot be cross-examined. The Supreme Court has also held that there are circumstances when a co-defendant's confession may be admitted as evidence if the non-confessing co-defendant's name is redacted from the confession. There is a circuit split, however, regarding how a trial court should determine whether such redactions are sufficient to avoid violating the Sixth Amendment rights of the non-confessing co-defendant. In some circuits, courts consider the confession in the context of other evidence at trial to determine whether, viewed in conjunction with that other evidence, the confession inculcates the non-confessing defendant and should be

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excluded. In others, courts consider the confession in isolation. The Supreme Court granted certiorari to resolve the split (*Samia v. United States*).

- **Criminal Law & Procedure:** The Supreme Court granted certiorari to determine the appropriate remedy when the government fails to meet its constitutional burden of proving that the venue of a criminal trial is proper: must the defendant be acquitted, as the Fifth and Eighth Circuits have held, or may the government retry the defendant in an appropriate venue, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held? (*Smith v. United States*)
- **Education:** Following its December 1 [decision to review](#) the Eighth Circuit's entry of a nationwide injunction pausing the implementation of the Biden Administration's student loan cancellation policy, the Supreme Court granted certiorari before judgment to review a Texas district court judgment vacating the policy. While the plaintiffs in the Eighth Circuit case are six states, the plaintiffs in the Texas case are two individuals, one ineligible for any student loan relief and one eligible for only partial relief. The Court will review whether the plaintiffs have standing, whether the program exceeds the Department of Education's statutory authority, and whether the agency adopted the program in a procedurally lawful manner. The Court intends to hear oral argument in February 2023. The district court's judgment vacating the policy remains in place pending the Court's resolution of the case (*Department of Education v. Brown*).
- **Securities:** The Supreme Court granted certiorari in a case addressing how certain anti-fraud provisions in the Securities Act apply to direct listings—transactions in which a company can become publicly traded without issuing new shares. Unlike traditional initial public offerings, direct listings involve the simultaneous flotation of both registered and unregistered shares. The Court granted certiorari to determine whether purchasers alleging that a company made material misrepresentations in a registration statement, in violation of [Section 11](#) or [Section 12\(a\)\(2\)](#) of the Securities Act, must prove that they purchased registered shares, which can be difficult in the context of direct listings. The Ninth Circuit held that, in cases involving direct listings, such plaintiffs need not trace their shares to an allegedly misleading registration statement. Other circuits, however, have held that, in cases involving multiple registration statements, Section 11 plaintiffs must trace their shares to an allegedly misleading registration statement (*Slack Technologies LLC v. Pirani*).

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases in which the appellate court's controlling opinion recognizes a split among the federal appellate courts on a key legal issue resolved in the opinion, contributing to a nonuniform application of the law among the circuits.

- **Bankruptcy:** The Second Circuit affirmed the Chapter 11 reorganization plan of LATAM Airlines Group S.A. and rejected a challenge by claimants holding claims against an affiliate of LATAM. The claimants argued they were impaired under [Section 1124](#) of the Bankruptcy Code because, under the plan, they could not recover post-petition interest on their claims. The claimants also argued they are entitled to interest under the solvent debtor exception, an equitable doctrine that predates the 1978 Bankruptcy Code. The court held that the claimants were not impaired under Section 1124 because the Bankruptcy Code itself, rather than the terms of the debtor's plan, precluded post-petition interest. The court declined to join the Fifth and Ninth Circuits in holding that the solvent debtor exception survived the enactment of the Bankruptcy

Code, reasoning that neither those circuits nor the claimholders here articulated a legal standard for determining solvency (*TLA Claimholders Group v. LATAM Airlines Group S.A.*).

- ***Civil Procedure:** The First Circuit added to a circuit split over whether named class representatives in class action lawsuits under [Federal Rule of Civil Procedure 23\(a\)](#) may recover incentive awards, or payments above and beyond the recovery they would receive by virtue of being a class member. At issue was the applicability of two Supreme Court cases that predate the civil rules, *Trustees v. Greenough* (1881) and *Central Railroad & Banking Company v. Pettus* (1885). These cases barred creditors suing on behalf of themselves and others from recovering for personal services and private expenses out of a common fund. The [Eleventh Circuit](#) recently applied these cases to Rule 23(a) class actions to bar incentive awards. The First Circuit disagreed, joining the [Second Circuit](#) and the [Seventh Circuit](#) in refusing to categorically prohibit incentive awards (*Murray v. McDonald*).
- **Civil Rights:** The Second Circuit affirmed a decision in favor of the Connecticut Interscholastic Athletic Conference (CIAC) and its member high schools under [Title IX](#) of the Education Amendments of 1972 over a policy allowing transgender students to participate in sports consistent with their gender identity. Applying the Supreme Court’s 2020 decision in *Bostock v. Clayton County, Georgia*, the court reasoned that CIAC’s policy did not fall within the scope of Title IX’s proscriptions. Accordingly, the court ruled, CIAC and its member schools lacked clear notice that the policy violated Title IX (*Soule v. Connecticut Association of Schools*).
- **Consumer Protection:** The Ninth Circuit affirmed a district court’s judgment for the Consumer Financial Protection Bureau in a civil enforcement action alleging that the defendant mailed deceptive solicitations offering services to assist students in applying for college scholarships. The court considered who is a provider of “financial advisory services” under the [Consumer Financial Protection Act](#) (CFPA) and the standard under which a court should determine whether such providers engaged in illegal deceptive conduct. The court rejected the defendant’s argument that his services fell outside of the CFPA because he advised only on “gift-based scholarships as opposed to investments or debt instruments.” Looking to the ordinary meaning of “financial advisory services,” the court held that the term is “broad and encompasses both cash financing and debt financing.” The court also adopted the “net impression test” when determining whether a solicitation is deceptive under the CFPA, holding that courts should look to the net impression created by the solicitation regardless of whether it “also contains truthful disclosures” (*Consumer Financial Protection Bureau v. Aria*).
- ***Criminal Law & Procedure:** The Eleventh Circuit held that when sentencing a criminal defendant under the [Armed Career Criminal Act \(ACCA\)](#), a court must consult the Controlled Substances Act (CSA) schedules in place at the time the of the defendant’s conviction for a prior state offense. The ACCA increases the mandatory minimum for defendants who possess a firearm and have certain prior convictions, including state drug convictions defined with reference to the CSA. The circuits are split as to whether sentencing courts must look to the CSA controlled substances list in effect at the time of the defendant’s prior state conviction or the list in effect at the time of the conviction for the federal firearm offense. The Eleventh Circuit reached its decision after vacating an [earlier panel decision](#) in this case holding that courts should look to the CSA schedules in place when the defendant committed the federal firearm offense (*United States v. Jackson*).
- **Criminal Law & Procedure:** A district court sentenced a defendant to five concurrent terms of life imprisonment on the basis of five separate convictions. That court subsequently granted the

defendant's motion to vacate two of those convictions based on intervening Supreme Court precedent but denied the defendant's motion to be resentenced. The Second Circuit affirmed, holding that the plain text of [28 U.S.C. § 2255](#) grants district courts discretion to decide whether or not to resentence a defendant who successfully collaterally attacks part of his conviction. The Second Circuit held that the district court did not abuse its discretion because any resentencing in this case would have been "strictly ministerial," as the remaining convictions also carried mandatory life sentences (*United States v. Peña*).

- ***Criminal Law & Procedure:** The Sixth Circuit affirmed a conviction on multiple child-pornography charges. On appeal, the court addressed a circuit split as to whether one-on-one communications constitute "notice" for seeking or offering child pornography or child exploitation under [18 U.S.C. § 2251\(d\)](#), or whether that term requires some form of public dissemination. Agreeing with most other circuit courts that have considered the issue, the Sixth Circuit held that Congress intended notice to include one-on-one communications. The court disagreed with the Eleventh Circuit's position that notice is ambiguous under the statute (*United States v. Sammons*).
- ***Employee Benefits:** The Fourth Circuit added to a circuit split over the proper standard to be used by district courts to resolve denial-of-benefits actions under the [Employee Retirement Income Security Act of 1974](#) (ERISA). The court disagreed with the circuits that have endorsed a "quasi-summary-judgment" procedure based on the administrative record. The court reasoned that ERISA disability cases often present contested facts, and in such cases, a court should not resolve factual disputes on summary judgment. Instead, the court held that the appropriate mechanism is a bench trial under [Federal Rule of Civil Procedure 52](#) because a bench trial allows a court to resolve material issues of fact (*Tekmen v. Reliance Standard Life Insurance*).
- **Immigration:** The Fifth Circuit denied a petition for review of a Board of Immigration Appeals (BIA) order removing an alien in absentia. The court reasoned that the BIA could hold a removal hearing without the alien present because she did not provide the government with her address, as required [by federal law](#). Additionally, the court rejected the alien's claim that the notice she received directing her to provide an address was insufficient because it was written in English. The court reasoned that nothing in the [statute governing removal proceedings](#) requires notice in any other language (*Plato-Rosales v. Garland*).
- **Immigration:** Amending a previous opinion, the Ninth Circuit affirmed the district court's denial of the petitioner's request to halt the execution of his removal order pending resolution of his motion to reopen his removal proceedings. The court held that [8 U.S.C. § 1252](#), which strips courts of jurisdiction over claims brought by "any alien arising from the decision or action by the Attorney General to ... execute removal orders against any alien," precluded review of the claim. The court also held that, under § 1252, its jurisdiction was limited to review of final removal orders and that the petitioner would be able to challenge his removal upon review of the final decision of the BIA on his motion to reopen. The court rejected the petitioner's arguments that § 1252 violates the [Suspension Clause](#) (which limits the suspension of the writ of habeas corpus) and the [Due Process Clause](#). The court determined that claims for relief from removal were "outside of the scope of habeas relief," which applies only to claims for relief from detention, and that the petitioner did not need to be in the country to appeal a final order of the BIA, which was all the process constitutionally required (*Rauda v. Jennings*).
- **Food & Drug:** The Fourth Circuit upheld a Food and Drug Administration (FDA) order denying an e-cigarette seller's application to market flavored e-cigarettes. The [Family Smoking Prevention and Tobacco Control Act](#) requires manufacturers to receive approval from FDA

before marketing new tobacco products by showing that the product would be appropriate for protecting the public health. Among other arguments, the court rejected the seller's challenge that FDA exceeded its statutory authority by requiring applicants seeking to market fruit- and dessert-flavored e-cigarettes to submit evidence showing that such products are better at promoting smoking cessation by adult smokers than tobacco-flavored e-cigarettes. The court held that the plain language of the statute contemplated such risk-benefit comparisons, given the substantial risk of youth tobacco product initiation posed by flavored e-cigarettes (*Avail Vapor, LLC v. U.S. Food and Drug Administration*).

- **Speech:** The Ninth Circuit amended a [March 2022 opinion](#) affirming the dismissal of Twitter's First Amendment retaliation suit against the Texas attorney general. The attorney general had demanded that Twitter produce documents about its content moderation decisions. Twitter argued this demand was impermissible retaliation for the platform's protected speech, including its decision to ban former President Donald Trump from its platform. In March 2022, the court held that the case was not *prudentially* ripe for consideration because the attorney general had not yet enforced the demand or brought any other claims against Twitter. In this amended opinion, the court ruled that Twitter's claims were not *constitutionally* ripe because Twitter's challenge was not a pre-enforcement challenge, but challenged the attorney general's act of demanding documents; in other words, it alleged the attorney general had already acted against Twitter. Applying the injury-in-fact standard for determining constitutional ripeness, the court ruled that Twitter failed to allege any chilling effect on its speech or any other legally cognizable injury (*Twitter, Inc. v. Paxton*).
- **Veterans:** The Federal Circuit, sitting en banc, ruled that a veteran who elects to receive benefits under the Post-9/11 GI Bill after participating in an older educational assistance program, such as the Montgomery GI Bill, is limited to the number of months of entitlement remaining under the older program unless the veteran first exhausts any remaining benefits under the older program. The court interpreted a time limit on benefits in the [Post-9/11 GI Bill statute](#) and held that this limit applied to veterans with single or multiple qualifying terms of service, reversing an earlier Federal Circuit decision. The court reasoned that the statute's plain text, as well as its legislative history, did not suggest that the provision would apply only to veterans with a single term of service and that, in light of this unambiguous statute, the court could not employ the pro-veteran canon of statutory interpretation (*Rudisill v. McDonough*).

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